1977

State of Utah v. Karl J. Stavar : Reply Brief

Utah Supreme Court

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Recommended Citation

Reply Brief, *Utah v. Stavar*, No. 15432 (Utah Supreme Court, 1977).
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IN THE SUPREME COURT OF THE

STATE OF UTAH

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STATE OF UTAH,

Plaintiff-Appellant,

-vs-

KARL J. STAVAR,

Defendant-Respondent.

Case No. 15412

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REPLY BRIEF OF APPELLANT

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APPEAL FROM THE JUDGMENT
OF THE DISTRICT COURT OF
CARBON COUNTY HONORABLE
EDWARD SHEYA, JUDGE

- - - - - - - - - - - - -

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IN THE SUPREME COURT OF THE

STATE OF UTAH

- - - - - - - - - - - - - -

STATE OF UTAH,

Plaintiff-Appellant,

-vs-

KARL J. STAVAR,

Defendant-Respondent.

Case No. 15432

- - - - - - - - - - - - - -

REPLY BRIEF OF APPELLANT

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APPEAL FROM THE JUDGMENT OF THE SEVENTH JUDICIAL DISTRICT COURT, IN AND FOR CARBON COUNTY, STATE OF UTAH, THE HONORABLE EDWARD SHEYA, JUDGE, PRESIDING

- - - - - - - - - - - - - -

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IN THE SUPREME COURT OF THE

STATE OF UTAH

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-vs-	:	Case No. 15432
KARL J. STAVAR,	:	
Defendant-Respondent.	:	

REPLY BRIEF OF APPELLANT

ARGUMENT

REPLY TO RESPONDENT'S POINT I

THE STATE HAS STANDING TO APPEAL IN THIS CASE BECAUSE AN ACTION TO REMOVE A PUBLIC OFFICIAL IS NOT A "CRIMINAL ACTION."

State v. Geurts, 11 Utah 2d 345, 359 P.2d 12 (1961) (hereinafter Geurts) is dispositive of this issue. That case involved an appeal from a final judgment in a removal proceeding brought under Utah Code Ann. § 77-7-1 et seq (1953), and this Court stated that "This proceeding can properly be regarded as quasi-criminal." (Emphasis added). 11 Utah 2d at 350, 359 P.2d at 16. In discussing the applicability of the Utah Rules of Civil Procedure to the removal proceeding, this Court held that "This proceeding can be nothing other than a special statutory proceeding. . ." (emphasis added), 11 Utah at 350, 359 P.2d at 17, and held that Rule 81(a) governed the action, rather than Rule 81(e), which would apply if the removal proceeding were a "criminal proceeding."

This Court's decision in Geurts, that an action to remove a public officer is not a criminal action, is consiste with the legislature's intent. Utah Code Ann. § 77-7-14 (1953) demonstrates that the legislature intended appeals from judgment in removal actions to be civil in nature where it provides, "From a judgment of removal an appeal may be taken to the Supreme Court in the same manner as from a judgment in a civil action. . ." (Emphasis added). Even the criminal code clearly states that removal from office is a civil matter. Utah Code Ann. § 76-3-201(2)(Supp. 1977) declares: "This chapter shall not deprive a court of authori conferred by law to . . .permit removal of a person from office. . .or impose any other civil penalty."

In an earlier case, Skeen v. Craig, 31 Utah 20, 86 Pac. 487 (1906), this Court aligned itself with what it termed "the great weight of authority" and "the better reason cases," in expressly holding that judicial proceedings for removal of officers were civil in nature. Id. 86 Pac. at 488. The Court considered the kind of judgment which may result as dispositive, and finding that no fine or imprisonment could be imposed declared the removal proceeding civil in nature.

The Guerts conclusion is also consistent with the fundamental right of appellate review guaranteed by the Utah Constitution. Article VIII, Section 9 of our constitution provides, "From all final judgments of the district court there shall be a right of appeal to the Supreme Court." In State v. Booth, 21 Utah 88, 91, 59 P. 553, 554 (1899), this Court interpreted that constitutional provision as:

> ". . .a plain and express provision of the fundamental law which grants the right of appeal 'from all final judgments of the district courts.' It is mandatory and applies alike to criminal prosecutions and civil actions. . .The State is not made an exception. . ." (Emphasis added.)

Respondent hopes to deny the State its right of appeal in this action by citing Utah Code Ann. § 77-39-4 (1953). The scope of that statute is limited, however, by Utah Code Ann § 77-39-1 (1953), which provides, "Either party in a criminal action may. . .appeal to the Supreme Court as prescribed *in this chapter*." (Emphasis added.) The State submits that § 77-39-4, by its very terms, applies only to criminal actions and that a removal proceeding is not a criminal action as has been shown above.

The *Geurts* conclusion is also consistent with the laws of other jurisdictions which hold that a proceeding to remove a public officer is not criminal in nature. *Sharpe v. State ex rel. Oklahoma Bar Association*, 448 P.2d 301 (Okla. Jud. 1968) cert. denied 394 U.S. 904; *Keiser v. Bell* 332 F. Supp. 608 (E.D. Penn. 1971); *McComb v. Commission on Judicial Conduct*, 138 Cal. Rptr. 459, 564 P.2d 1 (1977); *Archbold v. Huntingdon*, 34 Idaho 558, 201 Pac. 1041 (1921).

Appellant submits that a removal proceeding is not a criminal action, and that § 77-39-4 is not applicable.

Respondent seeks to apply Section 77-39-4 to a non-criminal action by relying on _Hartman v. Weggeland_, 19 Utah 2d 229, 429 P.2d 978 (1957) (hereinafter _Hartman_). Appellant submits that _Hartman_ is of limited precedential value, and, assuming it is a viable precedent, is inapplicable to the case at bar. First, in _Hartman_ the State sought to appeal an order of a district court that compelled discovery _in a criminal action_ (i.e., an action to prosecute a criminal offense defined by Title 76 of the Utah Code, to which criminal penalties attach). _Hartman_ is therefore distinguishable from the case at bar, which is an appeal from a final judgment in a non-criminal removal proceeding. Second, the _Hartman_ decision appears not to have been followed by this Court. In _Van Dam v. Morris_, 571 P.2d 1325 (Utah 1977) (hereinafter _Van Dam_), this Court allowed the State to appeal a district court's dismissal of a petition for a writ of mandamus that arose from the erroneous dismissal of a criminal action. The _Van Dam_ case appears consistent with the line of cases which allow the State to appeal in non-criminal actions which arise directly from criminal actions. See, e.g., _Winnovich v. Emery_, 33 Utah 345, 93 Pac. 988 (1908), holding that the State may appeal from a judgment in a habeas corpus action which collaterally attacks a criminal judgment. Appellant submits that Hartman has not been followed by this Court, and is inapplicable to the case at bar.

There is a potent policy consideration which supports granting the State a right of review in this case. If corruption in a county or district were to spread so as to include judicial as well as other public officers, a corrupt judge could protect his corrupt confederates by dismissing any accusation brought against them. If the judge's dismissal is unappealable, the corrupt county system could become self-perpetuating. Appeal is the only satisfactory remedy, and the only satisfactory "correction of any despotic or arbitrary dismissal of a case by a judge." State v. Davenport, 30 Utah 2d 298, 300, 517 P.2d 544, 546 (1973) (Crockett, J. dissenting). Appellant urges this Court to hold Section 77-39-4 inapplicable to removal proceedings in order to protect the integrity of government.

One other consideration could make removal based upon a criminal conviction impossible if the court held removal proceedings to be criminal. Presently a person may be removed for conviction of certain crimes (as well as for malfeasance) according to removal statutes. If removal is criminal, and a removal is attempted, based upon a conviction and not upon malfeasance in office, then the double jeopardy clause of the Utah State Constitution would come into play, barring the second criminal action (removal) against a defendant for the same conduct arising out of a single criminal episode. Removal based upon a conviction might well be impossible if removal is criminal. This double jeopardy problem is one of the precise reasons many courts have held removal proceedings not criminal. Thurston v. Clark, 107 Cal. 285, 40 Pac. 435 (1895). Accord, Skeen v. Paine, 32 Utah 295, 90 Pac. 440 (1907); Law v. Smith, 34 Utah 394, 98 Pac. 300 (1908).

REPLY TO RESPONDENT'S POINT II AND AMICUS CURIAE

A CONVICTION FOR A CRIME IS NOT A PREREQUISITE TO INITIATION OF AN ACTION TO REMOVE A PUBLIC OFFICIAL, ESPECIALLY WHEN REMOVAL IS BASED UPON MALFEASANCE IN OFFICE.

The earlier pre-1967 removal statute was interpreted by this Court in State v. Jones, 17 Utah 2d 190, 407 P.2d 571 (1965), as requiring misconduct "in office" for removal and leaving an official, guilty of crimes outside of office, immune from removal. Thus, county auditor Jones who failed to file an income tax return while in office, was apparent sent to prison (see Representative Frost below) and yet was held not subject to the removal action. Responding to this decision, Representative Frost of the Utah State Legislature submitted a legislative amendment to the 1967 Legislature to "strengthen" this law. Referring to Respondent's exhibit, Transcript of Debate for Third Reading House Bill No. 82:

> "REPRESENTATIVE FROST: . . . I would like to give you just a little bit of background on this bill. It came about through the incident here in Salt Lake County of Mr. Jones being convicted and being sent to prison while in office, and so I decided that probably there was something that needed to be done about the bill. I read in the paper where the governor and other officials said that the law was not clear on cases like this and that it should be cleared up, so I asked, first before the session started, I asked Mr. Lewis Lloyd from the Legislative Council to research this up a bit. I didn't ask him to prepare a bill, but I asked his opinion on it and he said yes, he concurred that the law needed to be cleared up and strengthened. When the session started he did have a bill prepared for me on this. . . I went down to the Attorney General's Office with it, and I also asked that the reference if they thought that this law should be strenghened and cleared up and they said yes, very definitely. They had the opinion also that there should be a strengthening

> in this field, the law should be clarified and strengthened."
> Floor Debate on House Bill 82,
> February 2, 1967.

Respondent admits that Representative Frost sought to strengthen the removal statute to correct the problem that arose because of State v. Jones, supra. To strengthen the law does not mean to narrow the scope and effect of the statute. In this case, it appears Representative Frost wanted to broaden the removal statute. In other words, Representative Frost apparently wanted to make an official who had committed wrongdoing outside of office subject to removal as well as one who had committed wrongdoing in office.

If respondent's interpretation of the removal statute is followed, this intent to broaden the removal laws and to create more responsibility in public office would be thwarted. If a public official must be convicted of a crime before removal, then public officials who are not performing their duties may well be immune from removal. For example, the offense of official misconduct, Utah Code Ann. § 76-8-201 (1953), as amended, requires a specific intent that the public official in his misconduct or misfeasance have the intent "[t]o benefit himself or another or to harm another. . . ." If the public official totally neglects his lawful duties and if he does not act with the motive of benefitting himself or another, he cannot be convicted, hence not removed from office. If he is corrupt for corruption sake and not for benefit he is free so to be, and the public is without protection. Such a result is not "strengthening" the law of malfeasance, but miserably emasculating it. Such a result flies in the face of the legislative intent.

Even if some other statute might allow removal of the corrupt officer by some other public officials (such as a county commission) if those other officials fail to act, the public has no protection, no speedy removal.

Provisions in state constitutions and in state statutes relating to the removal of public officials are intended to provide a speedy remedy for the removal of corrupt and unfaithful officials. State v. Scarth, 151 Okl. 178, 3 P.2d 446 (1931); Com. ex rel. Davis v. Malbon, 195 Va. 368, 78 S.E.2d 683 (1953). The reason for such provisions is based on public policy: specifically, they are intended to protect the public interest.

The Supreme Court of Utah in State v. Geurts, supra, emphasized the underlying reasons for the expeditious nature of removal proceedings:

> "From a survey of the chapter (77-7 U.C.A. 1953) it appears that the legislature thought the interests of the public in combating corruption in public office require an expeditious procedure for the removal of public officers who betray their trusts. Quite likely this is the reason why no provision is made therein for a preliminary hearing as is done for felonies in the criminal code.
>
> The need for reasonable expedition and the elimination of obstructing or delaying tactics cannot be ignored." Id., 359 P.2d at 16.

Requiring now, not only a possible preliminary hearing, but a trial and a sentence, before proceedings could be initiated and a trial held for removal, does not comport with this intent and public interest.

Respondent places great weight on the statements of two legislators in 1967. However, it should be noted that one of the two felt or desired that a person not be removed unless a conviction for a felony preceded removal. Representative Frost stated that "they have to be convicted of a felony to begin with. . . ." Respondent's Brief at page 9. Obviously and gratefully his desires in that regard were not followed by the legislature.

When the criminal code was changed in 1973, the legislature chose not to repeal the words "malfeasance in office" in Utah Code Ann. § 77-7-1 (1953), as amended, even though a crime labelled "malfeasance in office" was to be repealed. Such action shows that the legislature desired to allow removal for malfeasance in office even though conviction for some crime so named would be impossibl This later expression of legislative intent clearly shows that respondent's analysis of the earlier, 1967, intent of the legislature is either false, or superseded as of 1973.

Respondent requests this Court to assume that the legislature did not know what it was doing when it failed to repeal the words "malfeasance in office" in Section 77-7- The assumption that a legislative body did not know what they were doing is one of the most disfavored doctrines of law. The legislature should be presumed to be acting responsibly and knowingly.

Great weight is given by respondent to have proof beyond a reasonable doubt before any removal. This Court in State v. Geurts, supra, and State v. Jones, supra, concluded the removal proceedings would require a burden of proof as in a criminal action. Thus, the burden of proof ar the protection to the public official is supplied by the removal proceeding itself.

REPLY TO RESPONDENT'S POINT III

THE DISTRICT COURT ERRED IN FINDING THE ACCUSATION TOTALLY DEFECTIVE FOR FAILING TO SET FORTH FACTS WITH SUFFICIENT PARTICULARITY TO STATE A CAUSE OF ACTION.

Respondent relies almost exclusively on Burke v. Knox, 59 Utah 596, 206 Pac. 711 (1922), which has been superseded by the entire later body of law regarding pleading and practice with respect to accusations. See, for example, the legislative history of Utah Code Ann. §§ 77-11-1, 77-21-6, 77-21-7, and 77-21-8 (1953), as amended, which statutes the State of Utah has relied upon in its original brief.

CONCLUSION

The State of Utah may appeal from the dismissal of the action to remove respondent from office because removal is not a criminal action. The legislature does not require a conviction to precede the initiation of a proceeding to remove. To hold otherwise would be to presume that the legislature used words and phrases inadvisedly, and desired to emasculate the law of removal. Pleading in this matter was correct under currently applicable laws regarding accusations.

Respectfully submitted,

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